

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| HARVEY A. AND BARRIE D. SCHNEIER | : | DETERMINATION |
| for Redetermination of a Deficiency or for | : | |
| Refund of New York State Personal Income Tax | : | |
| under Article 22 of the Tax Law and New York | : | |
| City Personal Income Tax under Chapter 46, | : | |
| Title T of the Administrative Code of the City | : | |
| of New York for the Year 1982. | : | |

Petitioners, Harvey A. and Barrie D. Schneier, 140 Nassau Street, #15A, New York, New York 10038, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1982 (File No. 803519).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 25, 1988 at 11:00 A.M. Petitioners appeared by Frederick T. Monett, C.P.A. The Audit Division appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether petitioner Harvey Schneier can deduct, under Internal Revenue Code § 212(3), 90 percent of a legal fee paid in connection with his divorce from his former wife.

FINDINGS OF FACT

1. Petitioner Harvey A. Schneier is a physician. He is on the staff of Columbia University. In 1982 he divorced his wife, Lynn. He remarried and then moved with his new wife from out of state to New York City.

2. (a) On his 1982 Federal return Mr. Schneier claimed an adjustment to income of \$24,637.23, identified in a separate schedule as being for alimony paid. Mr. Schneier also deducted miscellaneous deductions of \$9,779.92. The largest item was for \$9,000.00 designated as for "tax planning re matrimonial division of assets and payment of alimony".

(b) Mr. Schneier filed a 1982 New York nonresident return (IT-203) for the first eight months of the year and a 1982 New York resident return (IT-201) for the last four months of the year. Petitioner deducted miscellaneous deductions of \$6,753.28 on his nonresident return and \$3,376.64 on his resident return for a total deduction of \$10,129.92. This is \$350.00 more than deducted on his Federal return. This \$350.00 is identified by the Division of Taxation in its answer as being for tax return preparation and is not in dispute. On his nonresident return, Mr. Schneier showed that 96.99 percent of his income was from New York sources and deducted that portion of his itemized deductions. On each return Mr. Schneier checked the filing status

"Single".

(c) On his New York Schedule for Change of Resident Status (IT-360), Mr. Schneier showed the adjustment for alimony paid, allocating two-thirds to his nonresident period and one-third to his resident period. The miscellaneous deductions and casualty and theft losses were also allocated two-thirds to his nonresident period and one-third to his resident period.

3. The Notice of Deficiency in this case was issued on January 8, 1986 to both Harvey Schneier and Barrie Schneier and is in the amount of \$1,070.03, plus penalty under Tax Law § 685(b) of \$53.50 and interest of \$324.22, for a total of \$1,447.75. A Statement of Personal Income Tax Audit Changes issued on October 1, 1985 indicated that the deficiency was computed by disallowing "Miscellaneous Deductions: Legal Deductions" of \$9,779.92 to the extent of 96.99 percent (\$9,485.54) for State tax purposes and disallowing one-third of that amount (\$3,149.52) for New York City tax purposes. (The one-third should actually be \$3,161.84, but that has not been commented on by the parties.)

4. The perfected petition in this case was filed by both Mr. and Mrs. Schneier. The answer, however, designates the petitioner as only Mr. Schneier. The answer at paragraph 4 refers to the total miscellaneous deductions of \$10,129.92 and states that \$9,000.00 was for legal fees related to the divorce, \$350.00 was a tax preparation fee and the balance was for "various deductible expenses".

5. The attorney that Mr. Schneier retained for his divorce, Rita K. Nadler of New Jersey, charged \$100.00 an hour for 100 hours. She allocated this in her bill to "tax planning" of 90 hours with respect to the division of assets and alimony, and to court appearances of 10 hours. In a letter in 1987 she explained that Mr. Schneier had met with his adversaries alone on some occasions so a legal fee was not charged on those occasions and that her own office work was concentrated on tax planning with respect to the transfer of the family house and a life insurance policy. The attorney did not appear at the hearing.

6. No evidence or argument was offered at the hearing by either party with respect to the disallowance of miscellaneous deductions other than the legal fee.

7. The penalty imposed is for negligence under section 685(b) of the Tax Law. The Division of Taxation has specified no reason for this penalty.

CONCLUSIONS OF LAW

A. The entire amount of the claimed deduction for the legal fee in connection with the divorce cannot be allowed. Such fees are deductible under Internal Revenue Code § 212(3) only to the extent they are ordinary and necessary expenses paid or incurred in connection with the determination of any tax and are otherwise nondeductible as personal expenses under Internal Revenue Code § 262. While the fee allocation of the attorney shows a small share attributable to court appearances and the preparation of a deed, it shows everything else attributable to "tax planning" and nothing at all attributable to the non-tax aspects of the office work involved in this divorce case. The tax planning involved (the transfer of a house and of a life insurance policy) does not appear to be so complicated as to itself justify 90 hours of work. If this work was made complicated because of restrictions raised by the more personal desires of the parties, then to that extent the amounts paid are personal and not deductible.

B. Some amount can be allowed as a deduction for tax advice in connection with a

divorce. Especially, as here, where one party is in a fairly high tax bracket, it is certain that some time was spent on the tax aspects of any transfers. This amount can be estimated (see, Goldaper v. Commr., 36 TCM 1381). The sum of \$2,000.00 would seem to be ample and is hereby granted.

C. The deficiency must be disallowed insofar as it relates to the miscellaneous deductions other than the legal fee. These deductions are small in amount (totaling only \$779.92 on the Federal return) and were disallowed only by inclusion in an amount described as a legal deduction. The perfected petition pointed out that legal fees claimed did not include these amounts. The answer of the Audit Division appears to concede this as to amounts but then asserts that these small amounts have been disallowed for lack of substantiation. Petitioner was justified in believing this to be a simple mistake in the deficiency notice, requiring only a showing of the actual amount of the legal fees paid. The answer, by asserting that these amounts which are business expenses were disallowed for failure of substantiation, clearly raises a new issue. In such a case, the burden of proof is on the Division of Taxation (Wilson v. Commissioner, 25 TC 1058; Estate of Schott v. Commissioner, 43 TCM 1188; Archiro v. Commissioner, 77 TC 881, 890). This burden has not been met in this case.

D. The negligence penalty is cancelled. Although the Audit Division did not specifically identify an act of negligence nor present arguments at the hearing, it is assumed that the penalty is aimed at the claim of deduction for such a large portion of the legal fee. It is apparent from the record, however, that Mr. Schneier relied, and had to rely, on the opinion of the divorce lawyer concerning this matter. This is sufficient to avoid any charge of negligence (Butler v. Commr., 51 TCM 126).

E. It would appear that the issuance of the deficiency notice to Barrie D. Schneier was a mistake, and as to her said deficiency must be cancelled.

F. The petition is granted to the extent of Conclusions of Law "B" through "E" above and the deficiency shall be redetermined accordingly.

DATED: Albany, New York

September 29, 1988

/s/ Nigel G.

Wright

ADMINISTRATIVE LAW JUDGE